ORIGINAL

92-9059

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. 92 -

JONATHAN DALE SIMMONS,

Petitioner,

v.

SOUTH CAROLINA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

1.

DOES THE EIGHTH AMENDMENT ENTITLE A CAPITAL DEFENDANT TO HAVE THE SENTENCING JURY INFORMED, AS A REASON NOT TO IMPOSE THE DEATH PENALTY, THAT UNDER STATE LAW THE JURY'S SENTENCING ALTERNATIVE OF "LIFE IMPRISONMENT" MEANS LIFE WITHOUT THE POSSIBILITY OF PAROLE?

2.

DID THE TRIAL COURT'S REFUSAL TO INFORM THE JURY THAT PETITIONER COULD NEVER BE PAROLED IF SENTENCED TO LIFE IMPRISONMENT VIOLATE HIS DUE PROCESS RIGHT TO REBUT THE PROSECUTION'S CASE FOR DEATH, WHERE THE STATE ARGUED THAT PETITIONER WOULD POSE A GRAVE RISK OF FUTURE VIOLENCE UNLESS HE WAS EXECUTED, AND WHERE THE JURY SPECIFICALLY ASKED ABOUT THE POSSIBILITY OF PAROLE?

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Petitioner Jonathan Dale Simmons prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina, together with the dissenting opinion of Justice Finney, is reported as State v. Simmons, 427 S.E.2d 175 (S.C. 1993), and is reprinted in the Appendix to this petition at A-1 through A-6. The order of the South Carolina Supreme Court denying rehearing is unreported, and is reprinted infra at A-7.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 1, 1993. A timely petition for rehearing was denied on March 10, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the eighth amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

2. It also involves the fourteenth amendment to the Constitution of the United States, which provides in pertinent part:

[N]or shall any state deprive any person of life . . .

without due process of law ... .

3. It also involves S.C. Code §§ 16-3-10 et seq. (1991 Cum. Supp.), which code sections are reprinted in the Appendix to this petition at A-8 through A-14.

4. It also involves S.C. Code § 24-21-640 (1991 Cum. Supp.), which provides in pertinent part:

> The [South Carolina] board [of probation, parole and pardon] must not grant parole, nor is parole authorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.

5. It also involves S.C. Code Ann. § 16-1-60 (1991 Cum. Supp.), which provides in pertinent part:

> For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree . . . [and] burglary in the first degree . . . .

STATEMENT OF FACTS

The issue in this case is whether a death sentence may be carried out when it was imposed by a jury which lacked a crucial piece of information about its only noncapital sentencing alternative--namely, that "life imprisonment" meant life imprisonment without eligibility for parole. The issue arose in the following way.

A. South Carolina adopts life without parole.

During 1985 and 1986, responding to intense public concern

about violent crime, the South Carolina General Assembly took up a comprehensive set of criminal justice reform proposals. 1985 S.C. Senate J. 1316. Included among these was a proposal to abolish parole for life term inmates who had been convicted of murder with aggravating circumstances.

This life-without-parole proposal initially passed the state House of Representatives, but encountered vociferous opposition from law enforcement officials and prosecutors who feared that such a sentencing alternative would encourage juries not to impose the death penalty in capital cases.[1] Prosecutors insisted that providing juries with a life-without-parole option "'objectively, over the long haul,' would do away with the death penalty."[2] At the same time, a coalition of high-ranking state law enforcement officials asserted in a letter to the legislature that enacting a life-without-parole sentence "will increase the risk of major crime by encouraging juries to refrain from applying the existing death penalty."[3] Based largely on these views, the state Senate voted

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[1]One state senator summed up the views of those opposing life without parole during debate on the Senate floor: "[I]f we pass [life without parole], let's close the death house . . . [and] transfer the chair to the state museum." This senator explained that "a juror considering the death penalty will think, 'I can put that person away forever, and my conscience will be clear.'" G. Rigsby, "Senate OKs amended crime bill," The State (Columbia, S.C.), March 20, 1986, at 8C.

[2]D. Kern, "Anders argues against life without parole," The State (Columbia, S.C.), March 16, 1986, at 4B.

[3]Associated Press, "Crime bill stalemate continues," The State (Columbia, S.C.), May 1, 1986, at 12C. A leading South Carolina victims' rights advocate and supporter of the life-without-parole

to delete life without parole from the anti-crime legislative proposal. 1986 S.C. Senate J. 1071, 1079.

The House, however, refused to accept the Senate's rejection of life without parole, and the crime bill languished in conference committee. As positions on both sides hardened, state representative Jean H. Toal, a House leader on the crime bill, proposed a way out of the legislative impasse. Rep. Toal argued that jury decisions in capital cases would not be affected by the no-parole provision because trial judges would not let jurors know about it.

> Mrs. Toal said she disagrees with people who say death[sic] without parole would make the death penalty obsolete.
>
> Judges would not permit juries to be told anything about a prisoner's chances for serving life or being paroled, she said.
>
> Ms. Toal said juries would continue to consider a penalty based on the heinous nature of a crime, rather than the possibility of parole.[4]

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option implicitly acknowledged the truth of the prosecutors' assessment of the impact of life without parole on the sentencing behavior of capital juries, but argued for adoption of the no-parole measure:

> "Some prosecutors think they have a better chance of getting the death penalty (for a criminal) if the only other option is life (with a chance for parole [in] 20 years)," Rossi said. "I'm more concerned about the times that we don't get it (the death penalty) and the violent criminal is released back on the streets."

D. Kern, "Anders argues against life without parole," supra (quoting Ray Rossi, President, Citizens Against Violent Crime).

[4]D. Kern, "House, Senate deadlocked on crime bill," The State (Columbia, S.C.), March 27, 1986, at 1C (emphasis added).

Ultimately, the state legislature agreed to a compromise under which aggravated murders would be punishable by life imprisonment without eligibility for parole for a minimum of 30 years, and sentences of life without possibility of parole would be reserved for offenders with prior convictions for violent crimes. See 1986 S.C. Acts 2983, 2990; S.C. Code §§16-3-20(A), 24-21-640 (1991 Cum. Supp.).

Representative Toal's prediction that these limitations on parole eligibility would be withheld from capital sentencing juries was briefly proven wrong, as the South Carolina Supreme Court ruled that capital defendants were entitled upon request to a jury instruction concerning the newly-enacted restrictions. State v. Atkins, 293 S.C. 294, 360 S.E.2d 302, 305-306 (1987). However, after Representative Toal was herself elected by the legislature to the state supreme court, the court reversed itself. In State v. Torrence, the state supreme court expressly overruled Atkins, and held that jury instructions should not include any specific information about parole ineligibility, but should simply direct juries to interpret the term life imprisonment "in its plain and ordinary meaning." 305 S.C. 45, 406 S.E.2d 315, 320 (1991) (Chandler, J., concurring, for a majority of the court). A month after South Carolina abandoned in Torrence the practice of providing full information to capital sentencing juries concerning the parole ineligibility of convicted murderers, petitioner's

capital sentencing hearing began.[5]

B. How petitioner came to be ineligible for parole.

Petitioner was indicted in a Richland County, South Carolina state court for the July 1990 beating death of an elderly woman, Ms. Josie Lamb, during a burglary at Ms. Lamb's home. Arrested the day after the murder, petitioner confessed to killing Ms. Lamb and to a series of break-ins and sexual assaults against several other elderly women committed over a one-year period. The week before his capital murder trial was to begin, petitioner pled guilty to first degree burglary and two counts of criminal sexual conduct in connection with two unrelated assaults on elderly women which occurred in August 1989 and June 1990.

Under the 1986 amendments to South Carolina's parole statutes discussed above, these prior convictions for three violent offenses rendered petitioner ineligible for parole consideration in connection with any sentence imposed for any subsequent conviction for a violent offense--including the murder of Ms. Lamb. S.C. Code § 24-23-640 (1991 Cum. Supp.); State v. Torrence, 406 S.E.2d at 320. South Carolina law authorizes only death and life imprisonment as punishments for murder. S.C. Code Ann. § 16-3-20(A) (1991 Cum. Supp.). Therefore, the only noncapital sentence that petitioner could receive upon conviction for the murder charge was life imprisonment without possibility of parole.

C. How parole eligibility was raised by the evidence but withheld from the jury.

The prosecutor seems to have recognized the critical significance of petitioner's parole ineligibility in the determination of the sentence, for he advised the trial judge, before the start of jury selection, that the state was "obviously going to ask [the court] to exclude any mention of parole throughout this trial." State v. Simmons, Transcript of Record at 210 [hereinafter cited as "Tr."]. The prosecutor moved for an order prohibiting the defense from asking prospective jurors any voir dire questions regarding the entire subject of parole. Tr. 217.

This motion was granted over petitioner's objection. Tr. 218-22.[6] As a result of this ruling, the defense was not permitted to question prospective jurors as to whether they harbored fixed preconceptions about parole eligibility and the actual meaning of a "life" sentence under South Carolina law, or whether they could disregard any such preconceptions and be guided instead only by the

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[5]Noting that then-Representative Toal's assurances concerning how the courts would treat petitioner's present claim may well have helped to break the 1986 House/Senate deadlock and led to enactment of the no-parole statute at issue, petitioner moved that Justice Toal recuse herself from participating in his direct appeal. The state opposed this motion. The state court summarily denied it. State v. Simmons, Letter Order dated September 24, 1992. Justice Toal ultimately voted with the majority in affirming petitioner's death sentence.

[6]The court relied on State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), cert. denied, 489 U.S. 1091 (1989), in which the South Carolina Supreme Court rejected a capital defendant's claim that he was constitutionally entitled to apprise the jury of restrictions on his eligibility for parole.

instructions of the court.[7]

The jury selected on the basis of this restricted voir dire then heard evidence tending to establish that the murder of Josie Lamb was one of a series of brutal attacks upon elderly women--including petitioner's own grandmother--that stretched over a fourteen month period ending with petitioner's arrest the day after Ms. Lamb's death. The state presented this evidence during both the guilt and sentencing phases of petitioner's trial. At the latter phase, the defense responded with mitigating evidence tending to show that petitioner's violent behavior stemmed from serious mental disorders, which were in part the product of many years of neglect and extreme sexual and physical abuse during his childhood and adolescence.

Although the state disputed the reliability of much of the information underlying petitioner's claim of mental disorder, both the state's case for death and petitioner's case for life had in common the recognition that petitioner posed a severe and continuing danger to elderly women. Indeed, the prosecutor made petitioner's admitted dangerousness the core of the state's appeal for a death sentence. He argued that the jury's sentencing verdict "should be a response of society to someone who is a threat," and

[7]The trial judge did define the term "death penalty" for the jury venire by advising the prospective jurors in his introductory remarks that "[b]y death penalty, we mean death by electrocution." Tr. 157. At no point during the proceedings, however, did the judge (or anyone else) inform the jury that "life imprisonment" meant imprisonment for life without possibility of parole.

repeatedly asserted that the jury's decision to sentence petitioner to death "will be an act of self-defense." Tr. 2056, 2064-65.

Petitioner's attempt to meet this "future dangerousness" line of attack consisted of two interrelated parts. First, he sought to show that his violent adult behavior was confined to attacks on elderly women, and that there was no reason to expect further acts of violence once he was isolated in a prison setting. Tr. 2074-75. This was inferentially supported by the testimony of a number of witnesses who had known petitioner in the community prior to the crimes, and who generally indicated that they found violence to be out of character. Tr. 1685-86, 1694-95, 1941-43, 1945, 1947, 1950.

Second, petitioner introduced evidence tending to establish that he would make a well-behaved and nonviolent inmate if he was sentenced to life imprisonment.[8] This evidence included testimony from a female medical assistant and from two supervising officers at the Richland County jail to the effect that petitioner had adapted well to prison life during pretrial confinement. Tr. 1959-61, 1974-75. In addition, petitioner offered expert opinion testimony from a clinical social worker and former correctional employee, Richard L. Boyle, who had both reviewed and observed petitioner's institutional adjustment. Mr. Boyle expressed the view, based on his assessment of petitioner's background and of his

[8]South Carolina declared such "adaptability" evidence irrelevant and inadmissible in State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), but has been required to admit it since this Court's decision in Skipper v. South Carolina, 476 U.S. 1 (1986).

current functioning, that petitioner could and would successfully adapt to prison should he be sentenced to life imprisonment. Tr. 1878-80.

In sum, petitioner's response to the state's future dangerousness argument was that he would not be dangerous so long as he was in prison. Since this line of defense was predicated on the fact that petitioner was legally ineligible for parole and would therefore actually remain in prison if given a life sentence, petitioner asked the trial judge so to instruct the jury in accordance with S.C. Code § 24-21-640. Tr. 1585-86; Defendant's Request to Charge No. 3, Tr. 2332-33.

In support of his request for an accurate instruction on his parole ineligibility, petitioner proffered outside the presence of the jury evidence that he would not be considered for parole if the jury sentenced him to life imprisonment. Attorneys for the South Carolina Department of Corrections and the Department of Probation, Parole and Pardons confirmed under oath that any offender in petitioner's position was in fact ineligible for parole under South Carolina law. Tr. 1574-83. The prosecutor did not question petitioner's ineligibility for parole. He did cross-examine the attorney for the Department of Corrections in an attempt to suggest that petitioner might receive holiday furloughs or other forms of early release. However, this cross-examination succeeded in establishing only that Department of Corrections regulations would further prohibit petitioner's release under early-release programs

such as work-release or supervised furloughs, and that no convicted murderer serving a life-without-parole sentence had ever been furloughed for any reason. Tr. 1576-79.[9]

In addition, petitioner offered and the trial judge admitted without objection the results of a scientific statewide public opinion survey conducted by the University of South Carolina's Institute for Public Affairs a few days before petitioner's trial. This survey showed that nearly half of all jury-eligible[10] adults questioned believed that a convicted murderer sentenced to life imprisonment in South Carolina could expect to be released from prison in less than twenty years; nearly three-quarters believed that release would occur after less than thirty years. Court's Exhibit 11, Table 2; Tr. 2327. By contrast, only 7.1 percent of those surveyed firmly believed that a life-sentenced inmate would

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[9]The prosecutor did not attempt to explore the possible effect of gubernatorial commutation on life-without-parole inmates, since South Carolina is one of the few states which does not allow the governor to commute prison sentences. S.C. const. art. IV, § 14 (1976) (commutation power extends to death sentences only); Julian H. Wright, Jr., Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?, 43 Vanderbilt L. Rev. 529, 550 n. 141 (1990) (listing South Carolina and Alabama as the only death penalty states where "a murderer [can] be put behind bars with no potential release mechanisms of any kind under a life-without-parole sentence"). Cf. California v. Ramos, 463 U.S. 992 (1983).

[10]To ensure that the sample was representative of potential jurors who were actually eligible to serve on capital juries, the poll ascertained whether each respondent's opinion concerning the death penalty depended upon the circumstances of each case. As a result, the sample was effectively "death-qualified" and "life-qualified" in a way roughly equivalent to the jury selection process in South Carolina capital cases.

actually have to spend the rest of his life in prison. Id.[11] Finally, more than three-quarters of those surveyed stated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer would actually have to serve in prison would be an "extremely important" or "very important" factor in their own choice between life and death. Table 3, Tr. 2328.

Based on this public opinion polling data, and on the evidence already before the jury concerning petitioner's history of violent behavior outside of prison, petitioner argued that fear of his possible release on parole would likely influence the jury's deliberations unless the court gave an accurate instruction as to the unavailability of parole in petitioner's particular case. Tr. 1597-1600. After considerable discussion, the trial judge concurred with the prosecution's position and refused the requested instruction, citing the state supreme court's then-recent decision in State v. Torrence. Tr. 1601-07.

Having failed in his efforts to have the trial judge provide the jury with accurate information concerning his ineligibility for parole, petitioner requested in the alternative that the judge give the following instruction:

> I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that the defendant be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.
>
> In your deliberations, you are not to speculate that these sentences mean anything different from what I have just told you, for what I have told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

Defendant's Request to Charge No. G, Tr. 2239. The trial judge refused this instruction, but stated that he would give a somewhat similar instruction if and when the jury inquired about petitioner's parole eligibility. Tr. 1607, 2038.

Following these rulings, the prosecutor successfully moved to prohibit defense counsel from "making any representations to the jury as to what [a life] sentence may or may not mean." Tr. 1649-50.[12] As a result, the defense arguments contained nothing from which the jury might have inferred that petitioner would be ineligible for parole if sentenced to life imprisonment.

Petitioner's attempt to limit the prosecutor's jury argument was less successful, however. Asserting that the trial court's refusal of his requested parole instruction made it impossible for him to meet the state's future dangerousness claim, petitioner

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[11]When first asked whether life-sentenced inmates could be considered for release, 20 percent of the sample said no. However, when asked to specify how long a life-sentenced murderer would have to serve, only 7.1 percent gave "life."

[12]The prosecutor based his motion upon State v. Stewart, in which the South Carolina Supreme Court criticized a defense attorney for inaccurately assuring the jury that his client would "be in jail for his entire life" if sentenced to life imprisonment. 283 S.C. 104, 320 S.E.2d 447, 451 (1984). The Stewart court characterized defense counsel's assertion as "patently misleading and improper" because the defendant would actually have been eligible for parole in 20 years.

moved in limine that the prosecutor be prohibited "from arguing or implying that the defendant will pose a risk of future violent behavior unless sentenced to death," and cited as authority Gardner v. Florida, 430 U.S. 349 (1977). Tr. 1648.

The trial judge denied petitioner's motion: although cautioning the prosecutor to confine his argument to the record, he explicitly upheld "the right of the state to argue the defendant's dangerous propensity." Tr. 1649. As noted earlier, the prosecutor made full use of this right in his penalty phase summation. He reminded the jury that even "[petitioner's] own psychologist Dr. Evans testified he is dangerous," Tr. 2056; he characterized the issue as "what to do with [petitioner] now that he is in our midst," Tr. 2065; and he repeatedly described the jury's decision for death as a simple matter of "self-defense." Tr. 2064, 2066.

After deliberating on petitioner's sentence for some 90 minutes, the jury sent out the following note:

JUNE 30, 1991

JUDGE ANDERSON,

DOES THE IMPOSITION OF A LIFE SENTENCE CARRY WITH IT THE POSSIBILITY OF PAROLE?

s/JAMES E. WRIGHT
JURY FOREPERSON

Tr. 2344. The jury returned to the courtroom where, over petitioner's objection, the trial judge gave this instruction:

> Mr. Foreman, I received the note and I respond as follows: Mr. Foreman and members of the jury, please, please, give me your attention. You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

Tr. 2106. Twenty-five minutes after having its question about parole answered in this fashion, the jury returned to the courtroom with a sentence of death. Tr. 2108-09.

D. The state supreme court's disposition of petitioner's parole ineligibility claim.

On appeal to the South Carolina Supreme Court, petitioner argued that concealment from the jury of his parole ineligibility violated the federal constitution in three separate ways. First, he contended that parole ineligibility was "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986), (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)). Therefore, he was entitled to have the jury informed of his ineligibility under well-established eighth amendment principles. McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (states may not constitutionally exclude from capital sentencing process "any relevant circumstances that could cause [the sentencer] to decline to impose the [death] penalty . . . and any relevant information offered by the defendant").

Second, relying on Beck v. Alabama, 447 U.S. 625 (1980), he asserted that by withholding from the jury the life-without-parole sentencing alternative that state law actually provided, the trial

court had impermissibly diminished the reliability of the jury's determination that death was the appropriate punishment.

And third, citing Gardner v. Florida, 430 U.S. 349 (1977), he argued that his due process right to rebut the state's affirmative case for death had been denied by the trial court's refusal to permit him to show that a noncapital sentence could adequately protect society from any future acts of violence by him. This was true because, on the particular facts of his case, the life imprisonment option included no possibility of release on parole.

The state court noted but declined to address petitioner's eighth amendment and due process claims. Instead, over Justice Finney's dissent, the court ruled that the trial judge's belated parole instruction, given in response to the jury's mid-deliberation inquiry, "satisfies in substance appellant's request for a charge on parole ineligibility." State v. Simmons, 427 S.E.2d at 179. Significantly, the state court did not disagree with petitioner's submission concerning the importance of his parole ineligibility in the jury's sentencing deliberations. Nor did it suggest that the first part of the trial judge's supplemental instruction--in which he admonished the jury not to consider parole or parole eligibility--actually sufficed to remove that issue from the case.[13] Instead, the state supreme court majority simply

[13]Any such suggestion would have been contradicted by the state court's own precedent. In State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989), cert. denied, 494 U.S. 1060 (1990), the state supreme court candidly acknowledged the ineffectiveness of similar cautionary instructions in response to jury inquiries about parole.

asserted that "a reasonable juror would have understood" the trial judge's "plain meaning" instruction as signifying "that life imprisonment indeed meant life without parole." Id.

Petitioner sought rehearing, pointing out that the jury had sentenced petitioner to death almost immediately after hearing the "plain meaning" instruction, that the instruction encouraged the jury to rely on the widely held but (in this case) incorrect perception that life term inmates are eventually eligible for parole, and that the admonition "not to consider parole or parole eligibility" inaccurately suggested that parole was a possibility in petitioner's case. Petitioner also asserted that the state court had apparently failed to consider petitioner's evidentiary showing concerning the high level of misinformation among the jury-eligible public on this issue, the refusal of the trial judge to

The Smith court explained two recent South Carolina decisions on the point as follows:

> In [State v.] Johnson, [293 S.C. 321, 360 S.E.2d 317 (1987)], the trial court charged the jury that "the possibility of parole is of no concern of yours"; in [State v.] Plemmons, [296 S.C. 76, 370 S.E.2d 871 (1988)], the trial court instructed jurors that "you are not to concern yourself with that [parole]." . . . The Johnson and Plemmons juries, instructed only that parole was not their concern, would have logically inferred that parole was someone else's concern. Simply put, those juries were practically invited to speculate about parole eligibility.

381 S.E.2d at 727 (emphasis in original). For a review of the evolution of South Carolina law governing parole consideration by capital sentencing juries prior to the advent of life without possibility of parole, see James M. Hughes, Informing South Carolina Juries About Parole, 44 S.C. L. Rev. ____ (Winter, 1993).

permit voir dire questioning of prospective jurors in order to uncover any preconceptions concerning the parole eligibility of convicted murderers, and the evidence in petitioner's case which would have caused the jury to entertain especially grave concerns about his possible release on parole. The state court denied rehearing by a four-to-one vote. Infra at A-7.

WHY THE WRIT SHOULD BE GRANTED

In California v. Ramos, 463 U.S. 992 (1983), the Court noted that many states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. 463 U.S., at 1013 n. 30. The purpose of these state law rules was to protect capital defendants from jury speculation concerning the likelihood of early parole release if the death penalty was not imposed.[14] In recent years, however, with the steady expansion of "life without parole" statutes,[15] parole for life-sentenced murderers has increasingly moved from a real possibility to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. And with this change, rules that once protected capital defendants from potentially harmful speculation can now serve to increase the danger of death sentences based on little more than jurors' misinformed fear of parole release.

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[14] See generally, W.E. Shipley, Annot., Prejudicial Effect of Statement or Instruction of Court as to Possibility of Parole or Pardon, 12 A.L.R.3d 832 (1967).

[15] See generally, Wright, supra, note 9, at 540-47 (describing and classifying various state life-with-parole statutory schemes).

This case illustrates in stark form the unfairness that results when the crucial fact of a defendant's lifelong parole ineligibility is withheld from the jury which must sentence him. The constitutionality of this mischievous practice is a question upon which the highest courts of several states are divided. compare Bruce v. State, 569 A.2d 1254 (Md. 1990); Turner v. State, 573 So.2d 657 (Miss. 1990); and State v. Henderson, 109 N.M. 655, 789 P.2d 603 (1990) (all holding that capital defendant's parole ineligibility may not constitutionally be withheld from sentencing jury); with Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929, 941 (1990), cert. denied, 111 S.Ct. 1338 (1991); and Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361 (1987) (both holding unavailability of parole irrelevant to jury's capital sentencing decision). Because of this division, and because the question is one of great importance to the administration of the states' capital sentencing statutes, petitioner submits that the Court should grant certiorari to resolve it.

A. THE TRIAL JUDGE'S "PLAIN MEANING" INSTRUCTION DID NOT ADEQUATELY PROTECT PETITIONER'S RIGHT TO A FAIR SENTENCING DETERMINATION

Before addressing the eighth amendment and due process issues presented by this case, petitioner would like to discuss the state supreme court's effort to avoid his constitutional claims by recasting the trial court's confusing and evasive response to the jury's parole question as the equivalent of an accurate no-parole instruction. With all due respect to the South Carolina Supreme

Court, it was wrong to think that the trial court's ambiguous "plain meaning" charge provided a satisfactory substitute for an accurate instruction. At a minimum, there is at least a "reasonable likelihood" that the jury did not understand the judge's "plain meaning" instruction as precluding the possibility of petitioner's release on parole. Boyde v. California, 494 U.S. 370, 380 (1990). This is so for several reasons.

First, the initial part of the judge's statement ("you are not to consider parole" and "[parole is] not a proper issue for your consideration") actually suggested that a life sentence did carry the possibility of parole, but that the jury should let some other authority concern itself with that fact. As the South Carolina Supreme Court has itself acknowledged, this is the natural interpretation. State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989), cert. denied, 494 U.S. 1060 (1990).[16]

As for the instruction upon which the South Carolina Supreme Court did rely--that the jury was to understand the term life imprisonment in its "plain and ordinary meaning"--the effectiveness of the charge obviously depended on whether, to the jurors who heard it, the "plain and ordinary meaning" of the term "life imprisonment" was life without possibility of parole. There is no reason, however, to believe that the jurors who sentenced petitioner to death understood the term "life imprisonment" in this way. There is substantial reason to think otherwise. State v. Smith,

[16]See n. 13 supra.

381 S.E.2d at 728 (Chandler, J., dissenting) ("the reality, known to the 'reasonable juror,' [is] that, historically, life term defendants have been eligible for parole").

Of course, because the prosecution successfully prevailed upon the trial judge to prohibit any voir dire inquiry into the matter, the record cannot show for certain exactly what the jurors thought on this question. Cf. State v. Henderson, 109 N.M. 655, 658, 789 P.2d 603, 606 (1990) (voir dire statements of jurors which revealed their erroneous beliefs about capital defendant's eligibility for parole showed need for accurate parole instruction).

On the other hand, petitioner's statewide public opinion poll established that for the large majority of jury-eligible South Carolinians, "life" imprisonment means not only the possibility that a murderer will be released after a period of years, but the probability that he will be.[17] Because the likelihood of parole

[17]The reliability of petitioner's poll was unchallenged below. The fact that numerous surveys throughout the nation have produced similar results strongly supports its conclusions. See, e.g., Frank A. Bennack, Jr., The Public, the Media and the Judicial System, 7 State Ct. J. 4, 10 (1983) (70 percent of Americans in national survey believed that criminal sentenced to "life imprisonment" would not spend rest of life in prison); William J. Bowers, Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions, 27 Law & Soc. Rev. 157, ___ (1993) (summarizing recent survey data from Florida, Georgia, Nebraska, New York and South Carolina, and concluding that "both citizen and juror grossly underestimate the time that will usually be served by murderers not sentenced to death"); Anthony Paduano & Clive Stafford Smith, Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Columbia Human Rights L. Rev. 211, 222 n. 33 (1987) (randomly selected capital jury veniremen in Cobb County, Georgia believed, on average, that "life sentence" meant imprisonment for 8.1 years); id. 223-225 n. 35 (summarizing results of county-wide survey in Georgia and of

release is so widely assumed--and exaggerated--there is no support for the state supreme court's conclusion.

The record does show, of course, that the jury was concerned enough about the subject to ask for further instructions: this fact alone casts some doubt on whether the jurors' understanding of the "plain meaning" of life imprisonment necessarily excluded the possibility of parole. And it would not have been unreasonable for the jurors to wonder why, if state law actually barred petitioner from parole consideration, the trial judge would not have answered the jury's straightforward question with an equally clear and simple statement.

Finally, the "plain meaning" instruction came too late. Although the state court's opinion neglects to mention this fact, the record shows that the judge's belated instruction was followed by a death sentence within a few minutes. A fair reading of this

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jury venire survey in Mississippi that both showed that estimates of anticipated "life sentence" duration averaged ten years or less); William W. Hood, III, The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing, 75 Va. L. Rev. 1605, 1624 n. 101 (1989) (median estimate by jury-eligible residents of Prince Edward County, Virginia of time that capital murderer would actually spend in prison on "life imprisonment" sentence was 10 years); Marshall Dayan et al., Searching for an Impartial Sentencer Through Jury Selection in Capital Trials, 23 Loy. L.A. L. Rev. 151, 171 (1989) (post-trial interviews of 30 Maryland capital jurors showed that half believed life term inmates would typically serve no more than 10-15 years in prison). That the public's understanding of the meaning of a "life sentence" includes eventual parole release is inferentially supported by other national and local surveys that show that Americans' support for capital punishment drops sharply when an alternative sentence which includes life without parole is offered. Joe Davidson, Death Penalty Support Found Not Firm, Wall St. J., Apr. 19, 1993, at B2.

record is that the jury had focused its attention on the possibility of petitioner's release on parole before it returned to the courtroom to ask about it, and the judge's unnecessarily evasive response simply sealed petitioner's fate.

In sum, the record does not support the state supreme court's conclusion that the "plain meaning" instruction served as an adequate substitute for a straightforward "no" in response to the jury's question about whether petitioner would be eligible for parole if sentenced to life imprisonment. The state supreme court's opinion notwithstanding, this case thus squarely presents the question of whether South Carolina's refusal to provide this crucial information to the capital sentencing authority violates the federal constitution. For the reasons which follow, petitioner submits that that question must be answered in the affirmative.

B. THE EIGHTH AMENDMENT ENTITLES A CAPITAL DEFENDANT TO HAVE THE SENTENCING JURY INFORMED OF HIS INELIGIBILITY FOR PAROLE UNDER STATE LAW.

The right to have the capital sentencing jury accurately informed of the meaning of its "life imprisonment" alternative stems from the eighth amendment's bar against arbitrary and capricious infliction of the death penalty. As the joint opinion of Justices Stewart, Powell and Stevens put the matter in Gregg v. Georgia,

> [i]f an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational

> sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never have made a sentencing decision.

428 U.S. 153, 190 (1976).

Since Gregg, the Court has implemented this fundamental constitutional principle in three interrelated ways:

> (1) by prohibiting procedures which needlessly undermine the reliability of the capital sentencing process, e.g., Beck v. Alabama, 447 U.S. 625 (1980); Caldwell v. Mississippi, 472 U.S. 320 (1985);
>
> (2) by requiring that the sentencing authority consider all relevant evidence why death should not be imposed in a particular case, Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 476 U.S. 1 (1986); and
>
> (3) by setting aside death sentences whenever the defendant has been deprived of a fair opportunity to rebut the prosecution's case for death, Gardner v. Florida, 430 U.S. 349 (1977).

What happened here violated this Court's precedents in each of these three areas.

1. Reliability

"The fundamental respect for humanity underlying the eighth amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (citations and internal quotation marks omitted). The withholding of the defendant's lifelong parole ineligibility from a jury which must sentence him either to death or to "life imprisonment" offends this principle. Because it distorts the jury's view of both the incapacitative and

retributive effect of the noncapital sentencing alternative, there is the needless risk that the jury will impose the death penalty simply to eliminate what is in reality a nonexistent danger of release on parole.

Where this record shows the risk of error most clearly is in the jury's exercise of its incapacitative judgment. Given the graphic and undeniably shocking evidence of petitioner's repeated attacks on elderly women, no responsible juror could avoid the question, "If I vote to spare his life, what then?" As a matter of simple common sense, the answer to this question depended in large part on whether petitioner would be securely imprisoned for the rest of his life, or whether he might be released on parole. See California v. Ramos, 463 U.S. at 1002-09 (noting relevance of possible gubernatorial commutation of sentence of "life without possibility of parole" to issue of defendant's possible future dangerousness).[18]

By withholding the answer which state law actually provided, the trial court permitted the jury to sentence petitioner while laboring under a fear arising from an impossibility--a fear which, though groundless in fact, was surely powerful enough to overcome any mitigating considerations. This Court's decisions have frequently recognized the importance of such predictions of future conduct in the capital sentencing process. Jurek v. Texas, 428

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[18]As noted above, supra at n.9, the precise issue addressed in Ramos could not arise under South Carolina law, since the governor may not commute a prison sentence.

U.S. 262 (1976); California v. Ramos; Barefoot v. Estelle, 463 U.S. 880 (1983). It would defy logic to suppose that a jury entrusted with the highly subjective and discretionary decision of whether to take or spare the life of a defendant such as this petitioner would be unaffected by the possibility of his being loosed upon society at some point in the future.

The withholding of such important information about the severity of the available life imprisonment option also impaired the jury's retributive judgment. Life without parole is a much harsher punishment than life with the possibility of parole release. See generally Harmelin v. Michigan, 111 S.Ct. 2680 (1991). Simply put, a jury's decision between life and death might well turn on the extent to which the severity of the particular form of "life" imprisonment corresponds to the grievousness of the crime which the defendant committed. A capital sentencing jury must make a retributive judgment, and it will make that judgment whether it is given accurate information or forced to rely on uninformed speculation. In a matter so necessarily imprecise and so governed by jurors' subjective emotions, any perception of unwarranted leniency will have its effect, and so it did in this case.

Nearly two decades before Gregg, the New Jersey Supreme Court observed, "That death should be inflicted when a life sentence is appropriate is an abhorrent thought." State v. White, 142 A.2d 65, 76 (N.J. 1958). Construing its own state law to prohibit death sentencing based on speculation concerning parole release, the

White court concluded, "The Legislature could not have intended that juries shall weigh the death penalty against something less than a life sentence, and by that process arrive at a punishment which does not fit the facts." Id.

As petitioner has pointed out, supra at 2-6, there is some reason to believe that the South Carolina legislature did intend precisely this mischievous result when it adopted its life-without-parole recidivist statute in 1986. But whether what happened in this case occurred by legislative design or judicial mistake, it plainly created a constitutionally unacceptable risk that petitioner's death sentence was the product of the jury's groundless fear of his premature release on parole, rather than of the evidence presented.

Beck v. Alabama, 447 U.S. 625 (1980), is analogous. In Beck, the Court struck down a portion of Alabama's death penalty statute which precluded the jury from considering lesser included offenses of capital murder. The Beck Court recognized that where the evidence would have supported a conviction for a lesser included offense, the "preclusion" clause created an unacceptable risk that the jury might convict the defendant of the greater offense only because the law provided no alternative but outright acquittal, rather than because the evidence actually warranted such a conviction. Like the preclusion clause involved in Beck, the trial judge's refusal here to give a clear and comprehensible explanation of the jury's life imprisonment option "enhance[d] the risk of an

unwarranted [death sentence]. " Id., 447 U.S. at 638. It needlessly pressured the jurors to err on the side of severity, and to impose death simply to foreclose the (illusory) possibility of petitioner's early release, rather than because a death sentence was actually warranted by the evidence. This injection of extraneous and prejudicial considerations into the jury's deliberations "tended to diminish the reliability of the sentencing determination." Id. Here and "in every case [it] introduce[s] a level of uncertainty and unreliability that cannot be tolerated in a capital case." Id. at 643.

2. The right to present mitigating evidence

"When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process." Walton v. Arizona, 497 U.S. 639, 653 (1990). In this case, a critical "facet of the sentencing process" about which the jury was not instructed was the meaning and effect of the jury's noncapital alterative of life imprisonment. Because this information provided a reason why the jury might have found the death penalty inappropriate in petitioner's case, and also because without it the jury could not accurately assess the weight to be accorded the other aggravating and mitigating evidence in the case, the withholding of petitioner's parole ineligibility violated the well-established eighth amendment requirement that capital sentencing authority consider "any relevant circumstances that could cause it to decline to impose the [death] penalty . . . and any relevant

information offered by the defendant." McCleskey v. Kemp, 481 U.S. at 306; Lockett v. Ohio.

The South Carolina Supreme Court has cited this Court's decision in California v. Ramos as support for its view that withholding a capital defendant's parole ineligibility from a sentencing jury raises no federal constitutional issue. See, e.g, State v. Patterson, 299 S.C. 280, 384 S.E.2d 699, 702-03 (1989), vacated on other grounds, 493 U.S. 1013 (1990), vacated on other grounds after remand, 111 S.Ct. 2913 (1991). Ramos, however, is not contrary to petitioner's claim. In upholding against eighth amendment challenge California's decision to provide sentencing juries with accurate information concerning the governor's power to commute a life-without-parole sentence, the Ramos Court noted the "elementary" fact that states remained free to prohibit consideration of defendants' parole eligibility as a means of providing "greater protections in their criminal justice system than the Federal Constitution requires." 463 U.S. at 1013-14 (emphasis added). But given the Court's emphasis on the accuracy of the challenged commutation instruction, id. at 1009, Ramos cannot fairly be read as authority for concealing crucially important sentencing information which, if known, might lead sentencing juries to choose life instead of death. See also Caldwell v. Mississippi, 472 U.S. at 341-43 (O'Connor, J., concurring).

South Carolina has sought to avoid the effect of the Lockett principle by declaring that a capital defendant's ineligibility for

parole is simply not a mitigating factor; therefore, it may be declared irrelevant to the sentencing process as a matter of state law. State v. Matthews, 296 S.C. 379, 373 S.E.2d 587, 592 (1988), cert. denied, 489 U.S. 1091 (1989); State v. Patterson, 384 S.E.2d at 702-03 (declaring that parole eligibility "is not mitigating evidence and is irrelevant to a defendant's adaptability to prison life," and asserting that whether to instruct on parole is a matter of state law only); State v. (William) Bell, 305 S.C. 11, 406 S.E.2d 165, 171 (1991) cert. denied, 112 S.Ct. 888 (1992); State v. Torrence, 406 S.E.2d at 323.

The flaw in this position is revealed by Skipper v. South Carolina, 476 U.S. 1 (1986), in which this Court rejected a similarly restrictive reading of Lockett in a slightly different context. In Skipper, the Court held that a capital sentencing authority may not be precluded from considering, as a mitigating factor, the likelihood that a convicted murderer would prove to be a cooperative and nonviolent prison inmate if sentenced to life imprisonment rather than to death. In so ruling, the Court noted that a capital defendant's likely future good behavior has no bearing on his culpability for the crime which he committed. 476 U.S. at 4. However, a defendant's future dangerousness or non-dangerousness has always been regarded as a relevant sentencing consideration. Jurek v. Texas, 428 U.S. 262 (1976); Barefoot v. Estelle, 463 U.S. 880 (1983). The Court held therefore that a defendant's likely future good behavior in prison is "'mitigating'

in the sense that [it] might serve 'as a basis for a sentence less than death.'" 476 U.S., at 4-5 (quoting Lockett v. Ohio, 438 U.S. at 604).

Skipper establishes that the constitutional meaning of the term "mitigating" is somewhat broader than simply that which lessens a defendant's moral blameworthiness. While considerations of moral culpability are certainly encompassed by this concept, see, e.g., Eddings v. Oklahoma, 451 U.S. 104 (1982) (defendant's violent childhood must be considered in mitigation), Skipper shows that evidence may have little or no relevance to a defendant's moral blameworthiness, and yet be "mitigating" under the eighth amendment principles of Lockett.[19]

Skipper concerned the exclusion of evidence, rather than the withholding of accurate legal information from the jury. But the Court would surely have reached the same result in Skipper if the information withheld from the jury in that case had been the fact that the defendant could never be considered for parole. A capital defendant's ineligibility for parole is a far more important

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[19]The Court has taken a correspondingly broad view of relevance in assessing the admissibility of evidence in aggravation, recognizing, for example, that a state may properly treat as relevant to a capital sentencing decision the full range of the harm caused by the murder, regardless of whether the murderer was fully aware of that harm when he acted. Payne v. Tennessee, 111 S.Ct. 2597 (1991). See generally Gregg v. Georgia, 428 U.S. at 203-04 (joint opinion of Stewart, Powell and Stevens, JJ.) ("So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information as possible when it makes the sentencing decision.").

determinant of whether he will pose an unreasonable risk of further violence than his pretrial behavior in jail. Similarly, the fact that a defendant can never be paroled may be expected to weigh much more heavily in a jury's deliberations than will the necessarily speculative predictions of future behavior involved in Skipper.[20] Thus it is plain that ineligibility for parole is, under the rationale of Skipper, a mitigating circumstance which cannot be constitutionally withheld from the sentencing jury when it is offered, as it was here, as a basis for a sentence of less than death. Lockett; Paduano & Smith, supra n. 17, at 238-44.

The Lockett facet of petitioner's claim does not depend, moreover, on whether the fact of his parole ineligibility is itself deemed a relevant mitigating factor. Rather, it is sufficient that the withholding of this information substantially impaired the jury's ability to assess the significance of other, indisputably relevant mitigating evidence.

The clearest example of this involves petitioner's effort to establish the likelihood of his future good behavior as a prison inmate. This evidence is unquestionably "relevant" within the meaning of Lockett. Skipper v. South Carolina. Yet, in this case, its weight was logically dependent on whether petitioner would in

[20]This is borne out both by the fact that petitioner's jury found the issue important enough to ask about during deliberations, and by petitioner's statewide survey, which showed that more than three-quarters of jury eligible respondents believed the amount of time a convicted murderer would actually have to serve in prison to be an "extremely important" or "very important" factor in a capital sentencing decision. Tr. 2328, Table 3.

fact remain in prison if the jury spared his life. See Franklin v. Lynaugh, 487 U.S. 164, 178 (1988) (construing Skipper as specifically concerned with capital defendant's right to prove his lack of future dangerousness in prison). Under these circumstances, petitioner's ineligibility for parole was the indispensable factual predicate for his Skipper evidence. By withholding that ineligibility from the jury, the trial judge unfairly minimized the significance which the jury would likely have accorded to petitioner's probable good behavior in prison.

Although states may provide a framework for the jury's consideration of mitigating factors, Franklin v. Lynaugh, id. at 179, there is no permissible state interest in constructing a framework which misleadingly minimizes the logical significance of the defendant's case for life. Withholding the simple truth about petitioner's parole ineligibility did exactly that. Therefore, it violated the rule of Lockett. Mills v. Maryland, 486 U.S. 367 (1988) (Lockett violated by jury instructions which might have impeded individual jurors' ability to give effect to mitigating factors); Penry v. Lynaugh, 492 U.S. 302 (1989); Hitchcock v. Dugger, 481 U.S. 393 (1987).

3. The right to rebut the state's case for death

The eighth amendment entitles a capital defendant to inform the sentencer that state law will keep the defendant in prison and protect society even if he is allowed to live. Even if it did not, due process nevertheless would have required such a no-parole

instruction under the circumstances of this case.

Petitioner has already detailed how the prosecution set out to persuade the jury that petitioner's execution was a practical necessity--"self-defense," as the prosecutor put it--if society was to be protected from future acts of violence. See supra at 8-9, 13-14. Petitioner responded that a less drastic but equally effective alternative did exist: the jury could sentence him to life imprisonment without possibility of parole. By denying petitioner the right to present this alternative, the trial judge violated "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" Skipper v. South Carolina, 476 U.S. at 5 n. 1 (quoting Gardner v. Florida, 430 U.S. at 362).

This one-sided presentation was inherently unfair. The unfairness was compounded, moreover, by the state's introduction of petitioner's record of prior violent offenses to show future dangerousness--the very record that rendered him permanently ineligible for parole. Thus while the prosecution was permitted to make unlimited use of these prior convictions as reasons to sentence petitioner to death, petitioner was barred from informing the jury of the fact that these same convictions operated to diminish substantially any threat of similar acts of violence by him in the future. See Ake v. Oklahoma, 470 U.S. 68, 86-87 (1985) (where state relied on psychiatric testimony to prove future dangerousness at capital sentencing hearing, denial of state funds for defense

psychiatrist violated due process).

It is no answer to petitioner's due process claim that the jury was (belatedly) instructed to disregard the question of parole. Quite apart from the fact that the state supreme court's opinion placed no reliance on the efficacy of this instruction to remove the subject of parole from the jury's deliberations, State v. Simmons, 427 S.E.2d 175, 179 (S.C. 1993), and that prior South Carolina decisions have expressly acknowledged its ineffectiveness, see State v. Smith, 298 S.C. 482, 381 S.E.2d 724, 727 (1989), even a showing that the jury did disregard the question of parole would not suffice. For once the prosecution had emphasized petitioner's alleged future dangerousness as a reason to sentence him to death, petitioner was entitled to have his ineligibility for parole affirmatively weighed in the balance as a factor tending to reduce the persuasiveness of the state's argument.

An additional facet of the due process violation which occurred in this case is revealed by Hicks v. Oklahoma, 447 U.S. 343 (1980). In Hicks, the Court struck down a 40-year sentence imposed by a jury because the trial judge, in violation of state law, had not instructed the jury that it could impose a substantially lesser sentence. Although jury sentencing is not in itself a constitutional right, Spaziano v. Florida, 468 U.S. 447 (1984), and although a properly instructed jury might well have imposed the same 40-year sentence upon Hicks, the Court held that the state had deprived him of his state-created liberty interest in having the

jury select his sentence from the full range of alternatives available under Oklahoma law.

The Fifth Circuit has succinctly summarized the holding of Hicks in terms especially applicable to the present case:

> [T]o establish a valid Hicks claim, the state criminal defendant must show . . . that the sentencing authority lacked knowledge and understanding of the range of sentencing discretion under state law . . . [and that] a substantial possibility exists that the sentencer, if properly informed, would have chosen one of these less severe sentencing options.

Dupuy v. Butler, 837 F.2d 699, 703 (5th Cir. 1988) (footnotes omitted). Here, of course, the sentencing option withheld from the jury was not, as in Hicks, the least severe alternative, but a "mid-range" sanction between death and life with parole. Under these circumstances, the likelihood of prejudice is all the greater, and the rationale of Hicks therefore applies with special force to this case.

C. PETITIONER'S REQUEST TO PROVIDE THE JURY WITH ACCURATE INFORMATION ABOUT HIS PAROLE INELIGIBILITY WOULD HAVE BEEN HONORED IN ALL BUT TWO OTHER COMPARABLE STATES.

Petitioner's constitutional claim is a narrow one. It does not call into question the general rule against consideration of parole eligibility, where capital defendants actually are eventually eligible for parole if not sentenced to death. See California v. Ramos, 463 U.S. at 1013 n. 30. Petitioner simply submits that where such eligibility does not exist as a matter of state law, rules designed to avoid speculation about whether and when parole

might actually be granted are no longer necessary, and must not be misapplied to permit the very evil which they were originally designed to prevent.

The practical effect of a ruling in petitioner's favor would also be relatively narrow. This is so because the capital sentencing procedures of most of the 23 capital jury-sentencing states which employ a life-without-parole alternative already comport with the constitutional principle invoked here.

In thirteen of these states, the jury is expressly informed of the defendant's ineligibility for parole by the terms of the sentencing verdict or recommendation itself.[21] In three additional

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[21]These thirteen jurisdictions may be subdivided into two subcategories: those which simply identify the jury's sentencing alternatives as death and life without parole, and those which allow the jury to specify whether a life sentence should be with or without parole eligibility. The nine states in the first category are **Alabama**, see Ala. Code §13A-5-46(e) (1982) (jury recommends either death or "life imprisonment without parole"); **Arkansas**, see Ark. Code Ann. 5-4-603(b) (Michie Supp. 1991) (jury may sentence to "life imprisonment without parole"); **California**, see Cal. Pen. Code 190.3 (West 1988) (trier of fact decides between death and a "term of life without the possibility of parole"), see also 1 California Jury Instructions, Criminal 8.84.2 (4th ed. 1979), (quoted in Boyde v. California, 494 U.S. 370, 374 (1990)); **Connecticut**, see Conn. Gen. Stat. §53a-46a(f) (West 1985) (verdict alternative to death is "life imprisonment without the possibility of release"); **Delaware**, see Del. Code Ann. tit. 11, 4209(a) (1987) (imprisonment for the remainder of defendant's natural life "without the benefit of probation or parole" is the only available verdict other than death); **Louisiana**, see La. Code Crim. Proc. Ann. art. 905.6 (West Supp. 1992) (jury returns sentencing verdict of death or "life imprisonment without benefit of probation, parole or suspension of sentence"); see also, Lowenfield v. Phelps, 484 U.S. 231, 235 (1988) (quoting jury instructions); **Missouri**, see, Mo. Ann. Stat. §565.020 (Vernon Supp. 1992) (jury's first degree murder sentencing alternatives are death or "imprisonment for life without eligibility for probation or parole, or release except by act of the governor"); **New Hampshire**, see N.H. Rev. Stat. Ann. §630:5 (IV)

states, statutory or decisional law requires that the sentencing jury be instructed that the defendant will be ineligible for parole, either in all cases, or where (as in petitioner's case) the defendant's prior criminal record precludes his parole consideration.[22] Two states, Utah and Florida, authorize life without

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(Supp. 1991) (jury determines whether death should be imposed rather than "life imprisonment without possibility of parole"); and **Washington**, see Wash. Rev. Code Ann. §10.95.030(1), 95.050 (West 1990) (jury chooses between death or "life imprisonment without possibility of release or parole").

The four states which allow the jury to specify whether the defendant should or should not be eligible for parole are **Maryland**, see Md. Ann. Code art. 27, §413(c)(3) (1987) (jury chooses between death, life imprisonment, or "imprisonment for life without the possibility of parole"); **Nevada**, see Nev. Rev. Stat. Ann. §175.161 (Michie 1986) (sentencing alternatives for first degree murder are death or life "with or without possibility of parole"); **Oklahoma**, see Okla. Stat. Ann. tit. 21, 701.10(A) (West 1992) (jury chooses between "death, life imprisonment without parole or life imprisonment"); and **Oregon**, see Or. Rev. Stat. §163.105 (1990) (jury's sentencing alternatives for aggravated murder are "death, life imprisonment without the possibility of release or parole or life imprisonment").

[22]Colorado capital sentencing juries must be instructed that life imprisonment means life without the possibility of parole. Colo. Rev. Stat. §16-11-103(1)(b) (Supp. 1991). In Illinois, a sentencing jury is to be informed that a life sentence for aggravated, repeat or multiple murder under Ill. Rev. Stat. ch. 38, para. 1005-8-1 (Smith-Hurd Supp. 1991), is for the remainder of the defendant's life, and that no such defendant "can be paroled or released, except through executive clemency." People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146, 1166 (1988). The Mississippi Supreme Court has held that where a capital defendant is ineligible for parole by reason of his status as a habitual offender under Miss. Code Ann. §47-7-2(1)(a) (Supp. 1991), the defendant is constitutionally entitled to have the trial judge inform the sentencing jury of his parole ineligibility. Turner v. State, 573 So.2d 657 (Miss. 1990), cert. denied, 111 S.Ct. 1695 (1991); Mackbee v. State, 575 So.2d 16, 38-41 (Miss. 1990); accord, Berry v. State, 575 So.2d 1, 13-14 (Miss. 1990), cert. denied, 111 S.Ct. 2042 (1991).

possibility of parole only under very rare circumstances, and neither state has as yet addressed whether defendants facing such sentences are entitled to have the jury apprised of their parole ineligibility.[23] Two of the remaining life-without-parole jurisdictions--South Dakota and Wyoming--do not appear to have considered the question of whether jurors should be instructed concerning the unavailability of parole under those states' current bifurcated capital sentencing procedures.[24]

This leaves only two jurisdictions other than South Carolina, Pennsylvania and Virginia, that impose life without possibility of parole on some or all convicted murderers but refuse to require that judges inform capital sentencing juries of that fact. 18 Pa. Cons. Stat. Ann. 3301(b) (Purdon 1983) (parole board may not release life prisoners); Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929, 941 (1990), cert. denied, 111 S.Ct. 1338 (1991); Commonwealth v. Strong, 522 Pa. 445, 563 A.2d 479, 485-486 (1989), cert. denied, 110 S.Ct. 1536 (1990); Va. Code §18.2-10, -31 (Supp. 1991) (Class 1 felony punishable by death or life imprisonment); Va. Code Ann. §53.1-151(B) (Supp. 1991) (certain recidivists ineligible for parole); O'Dell v. Commonwealth, 364 S.E.2d 491,

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[23]A newly-enacted Florida statute provides for life without possibility of parole as an alternative to the death penalty in a narrow category of capital drug offenses. Fla. Stat. 893.135, 921.142(4)(b) (Harrison 1991). Utah has similar limitations on parole only for certain sex-related crimes. Utah Code Ann. 76-3-408 (1990).

[24]See S.D. Codified Laws Ann. §24-15-4 (1988); Wyo. Stat. §§6-2-101(b), 7-13-402(a) (Supp. 1991).

507, cert. denied, 488 U.S. 871 (1988); see also O'Dell v. Thompson, 112 S.Ct. 618 (1991) (Blackmun, J., respecting denial of certiorari).[25] Neither the Pennsylvania nor Virginia courts appear to have explained in any detail the reasons for their unusual position. Therefore, it is not possible to discern whether any peculiarity of Pennsylvania or Virginia law may justify the refusal of those states to inform capital sentencing juries of capital defendants' permanent ineligibility for parole.[26]

In sum, petitioner's request that the jury be told that a life sentence means life without parole would have been granted in all but a handful of jurisdictions. Indeed, in sixteen life-without-parole states petitioner's request would have been unnecessary,

[25]For a detailed discussion of the constitutionality of Virginia's treatment of this issue prior to O'Dell, see William W. Hood, III, The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing, n.17 supra.

[26]One factor that might help to explain the position taken by the Pennsylvania and Virginia courts is that, in contrast to South Carolina, both states provide for gubernatorial commutation of prison sentences. Pa. Const. art. 4, §9(a) ("In all criminal cases except impeachment, the Governor shall have power . . . to grant . . . commutation of sentences" subject to recommendation of Board of Pardons); Va. Const. art. V, § 12 ("The Governor shall have power to remit fines and penalties . . . [and] to grant reprieves and pardons after conviction . . . "). Because a sentencing verdict of "life imprisonment without possibility of parole" might be deemed misleading where state law provides for the possibility of gubernatorial commutation, see California v. Ramos, 463 U.S. at 1009, an argument can fairly be made for excluding all mention of post-conviction release in jurisdictions where such commutation is possible. But as noted previously, South Carolina is one of only two death penalty states in which sentences of life-without-parole may not be modified by gubernatorial commutation. Ala. Const. Amend. XXXVIII § 124 (governor may commute only death sentences); S.C. Const. art. IV, § 14 (same); see Wright, supra n. 9, at 550 n. 141.

because the trial judge would have submitted verdict forms to the jury making clear that the life sentence alternative was without possibility of parole, or else would have instructed the jury to that effect at the outset of their deliberations.

Although such an overwhelming weight of authority does not, in and of itself, condemn as unconstitutional the practices of the two minority jurisdictions, the readiness of all but a few states to enlighten the jury on the point surely suggests the importance of the information at issue. The Court's observation regarding the general rule governing submission of lesser included offenses in Beck v. Alabama, could be said of parole ineligibility as well: "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard." 447 U.S. at 636-637.

D. THE ISSUE PRESENTED BY THIS CASE REQUIRES RESOLUTION BY THE COURT

In his opinion respecting the Court's denial of certiorari in O'Dell v. Thompson, 112 S.Ct. 618 (1991), Justice Blackmun characterized as a "substantial federal claim" a Virginia death-sentenced prisoner's argument that his right to rebut the prosecution's case for death had been violated by the trial judge's refusal to inform the jury that the only available alterative to a death sentence was life imprisonment without parole. Id. at 619 n. 3. Even more recently, Justice Souter noted the broader question of "the propriety of a sentence based on future dangerousness to

the public when there is no possibility that a defendant will be sentenced to a term less than life without the possibility of parole." Graham v. Collins, 113 S.Ct. 892, 925 n. 10 (1993) (Souter, J., dissenting).

The questions noted in these opinions are familiar to any trial-level observer of the administration of American capital punishment statutes. See, e.g., J. Mark Lane, "Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence, 26 Loy. L.A. L. Rev. 327, 368-90 (1993) (setting out transcript excerpts showing that between 1973 and 1990, jury inquired about parole eligibility in 25 percent (70 out of 280) of Georgia cases where death penalty was imposed). Because the widespread trend toward restricting or abolishing parole for violent offenders has not been accompanied by public awareness of the increasing severity of noncapital punishments, see supra at n. 11, the Court may expect to encounter other cases in which death sentences were imposed by juries unaware of the existence of a life-with-parole alternative.

South Carolina may well have been justified in removing all hope of parole from repeat violent offenders. But once the state made the judgment that such perpetual imprisonment was necessary to protect society from offenders like the petitioner in this case--that society could never again allow him to be, as the prosecutor put it, "in our midst"--there was no justification for concealing that fact from the jury charged with determining whether petitioner

should be executed or allowed to live. The Court should grant certiorari to consider the important constitutional questions raised by this case, and should require that petitioner be resentenced by a jury informed of its actual sentencing alternatives. Only then will it be possible to say that petitioner's sentence, whatever it may ultimately be, is "based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. at 357.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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By: David J. Bruck
ATTORNEYS FOR PETITIONER

June 8, 1993

* Counsel of Record

The STATE, Respondent,

v.

Jonathan Dale SIMMONS, Appellant.

No. 23784.

Supreme Court of South Carolina.

Heard Oct. 13, 1992.

Decided Feb. 1, 1993.

Rehearing Denied March 10, 1993.

Defendant was convicted by the Rich- and County Circuit Court, Ralph King

Anderson, Jr., J., of murder, first-degree burglary and petty larceny, and defendant appealed. The Supreme Court, Moore, J., held that: (1) evidence of previous crimes was properly admitted, and (2) jury was properly instructed that sentence of life imprisonment meant life without parole.

Affirmed.

Finney, J., filed dissenting opinion.

1. Criminal Law ⇐371(1)

Clear and convincing evidence of other crimes that is logically relevant to prove intent is admissible under *State v. Lyle* if its probative value outweighs its undue prejudicial effect.

2. Criminal Law ⇐338(1)

Evidence is relevant if it tends to make more or less probable some matter in issue upon which it directly or indirectly bears.

3. Criminal Law ⇐371(6)

Evidence that defendant committed violent sexual assaults after forcing his way into elderly victims' homes was properly admitted as evidence tending to establish intent on burglary charge; evidence of defendant's violence against elderly women, each of whom was alone in her home at time of attack, made more probable defendant's criminal intent when he entered current victim's home, since he already knew her to be elderly and theft was not overwhelming motivation in prior cases.

4. Criminal Law ⇐769

Test for sufficiency of jury charges is what reasonable juror would have understood charge to mean.

5. Criminal Law ⇐823(1)

Although trial judge in murder trial erroneously declined to give "plain meaning" charge upon request, error was cured when he properly answered jury's question regarding possibility of parole by giving plain meaning charge, from which reasonable juror would have understood that life imprisonment meant life without parole.

David I. Bruck, and M. Anne Pearce, of S.C. Office of Appellate Defense, Columbia, for appellant.

Atty. Gen. T. Travis Meldock, Chief Deputy Atty. Gen. Donald J. Zelenka, and Sol. Richard A. Harpootlian, Columbia, for respondent.

MOORE, Justice:

Appellant was convicted of murder, first degree burglary, and petit larceny. He was sentenced to death, a consecutive life term, and thirty days. We affirm.

FACTS

On July 17, 1990, the victim, Josie Lamb, was found dead in the bathroom of her home in the Olympia area of Columbia. Her skull had been crushed by an assailant who used the toilet tank lid to beat her on the head. Ms. Lamb was seventy-nine years old.

Appellant's fingerprint was found on the commode lid and his bloody footprint on the floor. He was arrested the next day and confessed to killing Ms. Lamb. He stated he went to her house "to see a white male named Jimmy, redheaded, he owed me 50 dollars." He had been to Ms. Lamb's house and asked for Jimmy the previous week but when he touched the door handle Ms. Lamb screamed and he fled. On the night of the murder, he entered the home and heard her scream. After looking around to be sure no one else was present, appellant went into the bathroom and struck Ms. Lamb twice on the head with the commode lid. At some point he unplugged the telephone. He took a nightgown from a bedroom and fled.

At the guilt phase of trial, counsel conceded that appellant had in fact murdered Ms. Lamb and had taken the nightgown. Appellant's defense focused on the State's failure to prove first degree burglary which was the only statutory aggravating circumstance alleged in this case. He contended there was no evidence he intended to commit a crime at the time he entered Ms. Lamb's house since, as stated in his confession, he had gone there intending only to look for "Jimmy."

In response to appellant's trial strategy, the State was allowed to introduce under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), evidence of appellant's confessions to other crimes against three elderly female victims.

ISSUES

1. Whether the *Lyle* evidence was properly admitted?
2. Whether appellant was entitled to a penalty phase charge regarding his parole ineligibility?
3. Whether a charge regarding general deterrence should have been given?
4. Whether a charge describing each asserted nonstatutory mitigating circumstance should have been given?

DISCUSSION

GUILT PHASE

S.C.Code Ann. § 16-11-311(A) (Supp. 1991) requires the State to prove as one element of first degree burglary that the defendant "entered a dwelling without consent and with intent to commit a crime therein." While such an intent is inferable from the defendant's conduct in the absence of other proof, *State v. Haney*, 257 S.C. 89, 184 S.E.2d 344 (1971), here the issue of intent was joined by evidence appellant had no intent to commit a crime when he entered Ms. Lamb's house. To prove intent, the Solicitor introduced the following three confessions given by appellant shortly after his arrest for Ms. Lamb's murder:

1. *Faris v. Mims*

   Ms. Mims is an elderly woman who lived in the Olympia area of Columbia at the time she was assaulted. In May 1990, appellant approached the front door of Ms. Mims house and asked for directions. He then went to her back door and forced his way in. He sexually assaulted her while choking her with some clothing around her neck. He stole $50 from the house. He admitted he chose the victim because he saw she was an "old lady."

2. *Marie Furtick*

   Ms. Furtick was seventy-one years old at the time she was assaulted by appellant in her home in the South Congaree area. In August 1989, appellant went to Ms. Furtick's front door and threw water on her when she opened the door. He then raped her, beat her, and stole money.

3. *Estelle Simmons*

   Ms. Simmons is appellant's grandmother. She was seventy-one years old and lived near Ms. Furtick when, in June 1990, appellant raped and beat her in her home. He unplugged her telephone and looked for money.

The State introduced other evidence that both Ms. Furtick and Ms. Simmons were very severely beaten about the head and face. Ms. Furtick was bitten on the breast and buttocks. Although appellant's confessions indicate he took money from both Ms. Furtick and Ms. Simmons, the State's evidence indicates nothing of value was taken from either home.

Appellant argues that this evidence of other crimes should have been excluded because (1) these crimes were too dissimilar to the Lamb murder to be probative and (2) the prejudicial impact of this evidence was too great.

[1] We find this evidence was properly admitted under *State v. Lyle* as evidence tending to establish intent. Clear and convincing evidence of other crimes that is logically relevant to prove intent is admissible under *State v. Lyle* if its probative value outweighs its undue prejudicial effect. *See State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990). Although appellant asserts these other crimes are "too dissimilar" to be admitted under *State v. Lyle*, we find the evidence of other crimes is logically relevant to the issue of intent.

[2, 3] Evidence is relevant if it tends to make more or less probable some matter in issue upon which it directly or indirectly bears. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991); *State v. Bell*, *supra*. The evidence of appellant's violence against elderly women, each of whom was alone in her home at the time of the attack, makes

more probable appellant's criminal intent when he entered Ms. Lamb's house since he already knew her to be an elderly woman. Although there was no sexual assault in Ms. Lamb's case, all of the previous sexual assaults were accompanied by terrific physical violence far beyond that needed to accomplish the sexual assault itself. Moreover, theft was not the overwhelming motivation in these prior cases. It is logical to conclude from the evidence that appellant was chiefly motivated in each case by an intent to violently injure an elderly woman. This evidence is therefore relevant to the issue of appellant's intent at the time he entered Ms. Lamb's home without her consent.

Further, we find the probative value of this evidence outweighs its undue prejudicial effect. The issue of intent was a contested one. *Cf. State v. Garner*, 304 S.C. 220, 403 S.E.2d 631 (1991) (prejudicial effect of evidence of other crimes outweighs its probative value when purpose for which it is admitted is not a contested issue). The fact that appellant's grandmother was one of several elderly women he violently injured is probative because it demonstrates that even her status as his grandmother did not negate his particular violent intent regarding elderly women.

We hold the evidence of other crimes was properly admitted under *State v. Lyle* as evidence tending to establish intent on the burglary charge in this case.

SENTENCING PHASE

At the sentencing phase of trial, appellant requested a charge that if sentenced to life imprisonment, he would be ineligible for parole under S.C.Code Ann. § 24-21-640 (Supp.1991).[1]

The trial judge ruled that *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), precluded any charge on parole eligibility or ineligibility. After the general sentencing charge was given, the jury posed a question to the judge: "Does the imposition of a life sentence carry with it the possibility of parole?" The trial judge then gave the "plain meaning" charge required under *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985), that the jury was not to consider "parole or parole eligibility" and the terms "life" and "death" are to be understood in their plain and ordinary meaning.

Appellant contends the trial judge erred in refusing his requested charge because *Torrence* did not settle this issue and failure to give the charge violates his due process and eighth amendment rights.

In *Torrence*, the defendant requested a charge that he would be ineligible for parole under § 24-21-640 since he was already serving a life sentence for a previous murder. The trial judge denied the request but offered to charge that under S.C.Code Ann. § 16-3-20 (Supp.1991) the defendant would be eligible for parole only after twenty or thirty years depending upon whether an aggravating circumstance was found. This is the charge approved in *State v. Atkins*, 293 S.C. 294, 360 S.E.2d 302 (1987).

Justice Finney, writing for the majority, reversed Torrence's death sentence because "the trial judge committed prejudicial error in denying [his] request to charge based upon § 24-21-640." 305 S.C. at 54, 406 S.E.2d 315. Justice Chandler concurred in result noting that the *Atkins* charge given under § 16-3-20 was inaccurate in Torrence's case. He then overruled *Atkins* for a majority of the Court because (1) parole is not a proper consideration for a sentencing jury since it is not a mitigating circumstance and (2) practical problems may arise in the application of the parole statutes. Further, Justice Chandler's analysis relies on the proposition that the issue is solely a matter of state law under *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

We need not engage in an academic discussion whether *Torrence* applies to both

1. Section 24-21-640 provides:
The Board [of Probation, Parole and Pardon] must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in § 16-1-60.

parole eligibility and ineligibility since we conclude the *Norris* charge given in this case satisfies in substance appellant's request for a charge on parole ineligibility.

In *State v. Davis*, — S.C. —, 411 S.E.2d 220 (1991), we clarified that despite our ruling in *Torrence*, a defendant is still entitled, upon request, to a plain meaning charge under *State v. Atkins, supra*. Although the trial judge erroneously declined to give a plain meaning charge upon request in this case, the error was cured when he properly followed *State v. Norris, supra*, in answering the jury's question regarding the possibility of parole as follows:

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

[4, 5] The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165 (1991); *State v. Patterson*, 299 S.C. 280, 384 S.E.2d 699 (1989). We conclude a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole. We therefore find appellant's argument without merit.

Appellant further contends the trial judge erroneously denied his requested charge that the jury should disregard any alleged deterrent effect on others in deciding whether to impose life or death. The Solicitor, however, declined to argue general deterrence to the jury and specifically stated "all we are here to do is to deter [appellant]." Thus, general deterrence was never an issue presented to the jury. Moreover, we have previously held the refusal to give such a charge is not error. *State v. Patterson*, 285 S.C. 5, 327 S.E.2d 650 (1984).

Finally, appellant argues the trial judge erred in denying his request that a detailed list of twenty-seven nonstatutory mitigating circumstances be submitted to the jury. Appellant concedes this procedure is not required so long as the jury is instructed, as it was here, to consider "any nonstatutory mitigating circumstances." *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981).

PROPORTIONALITY REVIEW

We have conducted the sentence review required by S.C.Code Ann. § 16-3-25 (1985) and conclude the evidence supports the jury's finding of an aggravating circumstance. We find the death sentence was not arbitrarily imposed and is proportionate to the penalty in similar cases.

AFFIRMED.

HARWELL, C.J., TOAL, J., and BRUCE LITTLEJOHN, Acting Associate Justice, concur.

FINNEY, J., dissenting in separate opinion.

FINNEY, Justice (dissenting):

I respectfully dissent. In my view, appellant was deprived of a fair trial by virtue of the erroneous admission of appellant's past crimes under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Further, I dissent from the majority's holding that appellant was not entitled to a jury charge to the effect that he would be ineligible for parole if sentenced to life in prison. I would reverse appellant's conviction and remand for a new trial.

Admission of Evidence Under State v. Lyle

At trial, the State introduced appellant's confessions to three past crimes involving the assault of elderly women for the purpose of showing that he entered the victims dwelling with the intent to commit a crime therein. In doing so, the State sought to satisfy the intent requirement of first degree burglary, S.C.Code Ann. § 16-11-311(A) (Supp.1991). In my view, these past crimes do not meet the test of admissibility under *Lyle, supra*, inasmuch as they are factually dissimilar from the present case,

or too remote in time, and in at least one instance, unduly prejudicial.

In order for evidence of other crimes to be admissible under the settled exceptions, the evidence must have "logical relevance to the particular excepted purpose for which it is sought to be introduced". *Lyle*, 118 S.E. at 807. Due to the very nature of such evidence and "the dangerous tendency and misleading probative force", its admission should be subject to rigid scrutiny by the courts. Should the court not clearly perceive logical relevance between the extraneous crime and the offense charged, the defendant should be given the benefit of the doubt and the evidence rejected. *Id.* See also *State v. Douglas*, 302 S.C. 508, 397 S.E.2d 98 (1990).

One prior incident on which evidence was admitted occurred more than one year prior to the offense for which appellant was on trial. I find this offense too remote in time to reasonably establish that because appellant entered this prior victim's dwelling with intent to commit a crime, he did so in the present case, or that there was a common scheme or plan. *Lyle*, 118 S.E. at 808.

Even if the evidence of past crimes is deemed relevant, it may nonetheless be excluded if the danger of unfair prejudice outweighs its probative value. *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987).

The state was permitted to introduce evidence of appellant's assault of his grandmother. I would hold that the prejudicial effect of this most egregious evidence was substantially outweighed by any probative value which may have been deduced therefrom. *Johnson, supra.*

Jury Charge On Parole Eligibility

Appellant contends the Circuit Court erred in declining to charge the jury that in the event he was sentenced to life in prison, he would be ineligible for parole under S.C.Code Ann. § 24-21-640. I agree.

Consistent with my opinion in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), I believe that appellant was entitled to a jury charge under § 24-21-640 since he "sought only to have the court declare correct and current law relevant to his case". *Id.* 406 S.E.2d at 320.

WEST KEY NUMBER SYSTEM

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March 10, 1993

David I. Bruck, Esquire
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M. Anne Pearce
Assistant Appellate Defender
South Carolina Office of
Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201

Re: The State v. Jonathan Dale Simmons

Dear Ms. Pearce and Mr. Bruck:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
denied.

s/David W. Harwell C.J.

s/Jean H. Toal A.J.

s/James E. Moore A.J.

"I would grant.

s/Ernest A. Finney, Jr. A.J.

Associate Justice Chandler,
not participating

March 10, 1993."

The remittitur in this matter is today being forwarded to the Clerk of Court for Richland County.

Very truly yours,

Brenda F. Shealy

DEPUTY CLERK

CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED

TITLE 16. CRIMES AND OFFENSES

CHAPTER 3. OFFENSES AGAINST THE PERSON

ARTICLE 1. HOMICIDE

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years; provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. Provided, further, that under no circumstances may a female who is pregnant with child be executed so long as she is in that condition. When the Governor commutes a sentence of death under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole. No person sentenced under the provisions of this subsection may receive any work-release credits, good-time credits, or any other credit that would reduce the mandatory imprisonment required by this subsection.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel shall be permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances

otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in § 44-53-370(e), 44-53-375(B), 44-53-440, or 44-53-445; or

(h) physical torture.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent, or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding an aggravating circumstance or circumstances beyond a reasonable doubt, shall, in writing, and signed by all members of the jury, designate the aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment as provided in subsection (A). In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found an aggravating circumstance or circumstances beyond a reasonable doubt. If the jury has found an aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided.

(D) Notwithstanding the provisions of § 14-7-1020, in cases involving capital punishment any person called as a juror shall be examined by the attorney for the defense.

(E) In every criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

§ 16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in§ 16-3-20, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter

provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of§ 16-3- 20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

§ 16-3-26. Punishment for murder: notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services.

(A) Whenever the solicitor seeks the death penalty he shall notify the defense attorney of his intention to seek such penalty at least thirty days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(B) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. Notwithstanding any other provision of law, the court shall order payment of fees and costs, not to exceed five thousand dollars per trial from funds appropriated for the defense of indigents.

§ 16-3-27. Punishment for murder: pregnant females.

In no case and under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition or anytime following thereafter for a period of at least nine months.

§ 16-3-28. Punishment for murder: right of defendant to make last argument.

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument.